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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947. No. 410

LUCILE P. DICKIE, Executrix of the Estate of James S. Dickie, Deceased,

Petitioner,

v.

GENE C. HUTCHINSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court of the United States

October Term, 1947. No. ....

Lucile P. Dickie, Executrix of the Estate of James S. Dickie, Deceased,

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v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Lucile P. Dickie, as Executrix of the Estate of James S. Dickie, deceased, for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Sixth Circuit dismissing a petition for exoneration from or limitation of liability in the District Court for the Northern District of Ohio, Eastern Division, and reversing a decree in admiralty of that court awarding damages in favor of the said Executrix in the sum of thirty thousand dollars, respectfully shows:

Statement of Matter Involved

The Proceedings Below. Decedent, James S. Dickie, was drowned while on Lake Erie in Respondent's cabin cruiser, the Cappy, on September 20, 1943 (R. 2, 15), and on

October 20, 1943, Respondent sold the Cappy for $10,160 (R. 3). Thereafter and on August 9, 1944 (R. 2), Respondent brought this proceeding for limitation of liability as to the proceeds of the sale.

The proceeding was started by the Respondent before action had been begun by the Petitioner, although Respondent had received a notice of claim on behalf of the Estate of James S. Dickie on March 15, 1944 (R. 3). Pursuant to monition and injunction issued (R. 11), the Petitioner was required to and did file a claim in the Respondent's proceeding (R. 17), and also filed an answer to the petition for limitation of liability (R. 15).

The District Court, Hon. Paul Jones, Judge, on conflicting evidence heard in court, tried both the issue of the right to limitation and the issue of the liability of the Respondent at the same time (R. 70, 132), and dismissed the petition for limitation of liability. Upon consent of the claimant's attorney, the District Court retained jurisdiction for the purpose of fixing damages (R. 131), and awarded damages to the Executrix in the sum of $30,000 (R. 140). The claim of the Executrix was the only one presented in the proceeding.

The Executrix in her answer and by reference in her claim alleged negligence of the Respondent in three main respects (R. 16); (1) negligence in operating the Cappy with its shallow cockpit in a rough sea on Lake Erie, (charges 1 and 4); (2) negligence in operating the Cappy while not properly manned (charges 1, 3 and 7); and (3) negligence in attempting to back the Cappy instead of turning around (charges 5 and 6). All of these allegations of negligence were upheld by the trial court in the findings of fact (R. 143).

The Circuit Court held (R. 160), that "there was sufficient evidence to support the court's denial of appellant's

claim for limitation of liability'',[1] but nevertheless, and in the same opinion held (R. 167) that there was no evidence to support the findings or the decree, and reversed the judgment and dismissed the case.[2]

The Circuit Court's reversal of the trial court's decision was predicated largely upon the lack of detail in the District Court's findings. The Circuit Court's opinion makes frequent criticisms of the trial court's findings, the character of which we show in assignment of error number 3, *infra*, page 18.

Most of the opinion of the Circuit Court was devoted to the negligence in the rescue attempts after the decedent

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[1] The District Court in denying the issue as to the right to limitation of liability stated (R. 132):

> "The Court: I am just deciding that you are not entitled to the limitation of liability. Of course, I also found the owner was negligent.
>
> Mr. Axtell: And that there was finding that he proximately contributed to it.
>
> The Court: Oh, yes. I think he was, most assuredly. Let me see that letter.
>
> Mr. Axtell: We have a claim that we filed. That is in the nature of a complaint, you see. (Handing to the Court.)
>
> The Court: This letter from the Coast Guard, I can't make it out, Claimants' Exhibit C. This was admitted in evidence without objection (examining). I thought you said there was something in here about his being pitched out because of the rub of the sea? Where was it that I heard it?"

(The phrase "rub of the sea" is a typographical error and should be role of the sea. The District Court here was doubtless referring to the testimony of John Oles, in charge of the U. S. Coast Guard Station at the mouth of the Cuyahoga River, who in line of his official duties questioned the members of the Cappy immediately after the accident in Respondent's presence, as follows: "Q. And you were told that he had fallen off the chair with the lurch of the boat A. I believe that is correct.")

[2] The Circuit Court applied the following rule (R. 167):

> "We recognize the correctness of the rule that we should accord due weight to the findings and judgment of the Court, but we are not bound to accept them".

had fallen overboard, stating that that "was the gravamen of appellant's claim" (R. 163). Finding of fact number 5, relating to this feature of the case, the Circuit Court treated as a mixed finding of fact and law, holding that if the Respondent erred at all in backing instead of turning the cruiser, the error was one of judgment and not of negligence (R. 167).

As to the findings of fact relating to the negligence in the operation and seaworthiness of the vessel,[3] resulting in the decedent's falling overboard, the Circuit Court made no specific comment but dismissed these aspects of the claim with the general statement (R. 163), see assignment of error number 9, *infra,* page 20, that there was no evidence of negligence. There was no showing by the Circuit Court that the District Court's findings in this respect were "clearly erroneous".

The Circuit Court also treated as a matter of law, finding of fact number 12, to the effect that damages were suffered as a direct result of Respondent's negligence, and in the discussion of negligence stated (R. 165) (assignment of error, *infra,* p. 19) that Appellant had the right to assume that Dickie would use ordinary care to protect himself. The Circuit Court further stated in closing (R. 162), that under the Ohio death statute (R. 193), the defence of contributory negligence of the decedent was available although it considered it unnecessary to consider testimony on this point.

The Negligence. The decedent who was a Vice-President of the American Shipbuilding Company (R. 71), while at luncheon on September 20, 1943, at Allendorf's in downtown Cleveland, Ohio, was personally invited to go on a cruise that afternoon on Lake Erie in Respondent's cruiser, the Cappy, by the Respondent (R. 40). The Re-

[3] A finding of seaworthiness is usually a finding of fact. *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 98 (1944).

spondent was a partner in Hutchinson and Company, managers of bulk freighters (R. 83).

Respondent described his cruiser as a 38 foot, twin screw, Mathews cruiser, with an after cockpit, the depth of which including the handrail along the top of the coaming was from two feet six inches at the after end to two feet eight inches where it sloped up to meet the cabin (R. 38, 39). It was powered by two 140 horsepower Kermath motors (R. 36).

The Cappy was at the Clifton Lagoons in Rocky River (R. 41), about 10 miles west of the mouth of the Cuyahoga River, the entrance to Cleveland Harbor where the Lakeside Yacht Club was located (R. 54). The accident happened on the return trip from the yacht club, about 6:45 P. M. (R. 64).

From luncheon time until the time of the accident, the wind had steadily increased, the report of the Weather Bureau, Cleveland Station, showing the wind direction and velocity the afternoon of September 20, 1943, as follows (R. 68): "2:00 o'clock, northeast, three miles; 3:00 o'clock, northwest, ten miles; 4:00 o'clock, northwest, eleven miles; 5:00 o'clock, northwest, twelve miles; 6:00 o'clock, north, twelve miles; 7:00 o'clock, north, fourteen miles."

John Oles, Chief Boatswain's mate, then an Ensign and in charge of the U. S. Coast Guard Station at the mouth of the Cuyahoga River (R. 108), Respondent's witness, testified that with the wind at a velocity of around fourteen miles, there would be waves three or four feet high with a distance of eight or nine feet between the waves (R. 114), and that at the time of the accident "There was quite a little sloppy sea running out along the breakwall" (R. 113).

During the course of the afternoon, Mr. Hutchinson had consumed a quantity of alcoholic stimulant, the rec-

ord showing that he had the following drinks; two drinks at Allendorf's, followed by luncheon (R. 52); one drink on board the Cappy (R. 52); one drink at the Bacher apartment (R. 51); two or three drinks at the yacht club (R. 101); total, six or seven drinks.

Returning from the Lakeside Yacht Club, Respondent was at the wheel and the controls of the Cappy (R. 42), although Respondent's captain, named Rhoda, had operated the cruiser on the trip down the lake to the yacht club (R. 105). Respondent claims that he proceeded at the rate of twelve miles per hour up to the breakwater and before proceeding into the lake, and that on leaving the harbor of the Cuyahoga River and proceeding into the lake, he slowed down to seven or eight miles per hour to keep from racing his propellers in the rough sea (R. 63). The Cappy was capable of a speed of eighteen or nineteen miles per hour (R. 51).

The decedent was sitting in one of the chairs in the after cockpit, port side, talking through the open cabin door to Mr. Smith, another one of the passengers who was sitting in the cabin directly in back of the Respondent (R. 45). The door from the Cappy's cabin to the after cockpit was open, fastened open so that it would not swing (R. 43). The Respondent kept chairs in the after cockpit (R. 37).

The Respondent saw Mr. Dickie sitting in the after cockpit and talking to Mr. Smith, he could not tell how many minutes before the accident (R. 45). The Respondent did not warn Mr. Dickie on keeping his feet in the seaway. He could not see that that was necessary (R. 61, 65), maintaining that the rolls of the boat were not severe enough to cause any warning (R. 65). Respondent, however, admitted in cross examination that the turning of the wheel of the Cappy would cause the stern to swing and the boat to lurch or go over some, even enough to throw a man overboard (R. 65).

The Respondent had ample cause to know what his cruiser would do because he had made weekend trips with his wife and their two oldest children on the Cappy during the sailing seasons of '40, '41, '42, and '43 (R. 36). Furthermore, on these weekend trips with his family he would not let his children go out to the after cockpit (R. 36).

On the other hand, Mr. Dickie had never been out with the Respondent in the Cappy before (R. 61). Mr. Dickie was purely an office man and did not spend time on various vessels (R. 82). He did not have a launch, merely a canoe and a rowboat (R. 90, 92).

Proceeding north out into Lake Erie about ½ or ¾ of a mile, the Respondent laid his course back westward to the Clifton Lagoons (R. 33). The Respondent testified on direct examination that the accident happened at the time he squared away and laid his course for the Rocky River, and that by squaring away he meant altering his course (R. 44).

On making the turn westward to Rocky River the Respondent did not slow down (R. 62). He maintained that he could not remember how long it was after he turned the boat that he heard the cry "man overboard" (R. 62). He claimed that he saw Mr. Dickie in the water, port astern, when he was about 75 or 100 feet away (R. 60).

It is alleged in the Respondent's petition (R. 2), and admitted in the answer (R. 15) that the decedent arose from his chair and fell over the port side. The District Court stated the physical incapacity of the decedent on that day as follows (R. 140): "Here was a man 63 years old. He did have this injury. He wasn't walking with a cane, but he was lame. I think Mrs. Dickie herself said that. And then he had this contusion of his chest." (Mr. Dickie had tried to leave the Hutchinson party at

the Clifton Lagoons before starting on the trip and had secretly gone to the house of a friend nearby, Mr. Bacher. Mr. Hutchinson, however, learned where he was and followed him there with the others of the party (R. 91, 92).)

On hearing the cry "man overboard" Respondent reversed his engines, first pulling the throttle to neutral in order to engage the engines, which he claimed was only a matter of a few seconds, and then backed astern. When he was 75 or 100 feet away a life ring was tossed which landed within 20 feet of Mr. Dickie (R. 46), and that on proceeding closer another life ring was tossed by Mr. Rhoda which landed within six or seven feet of Mr. Dickie (R. 47).

It did not occur to the Respondent to circle fast around (R. 61). On conflicting evidence (R. 99, 122, 111), the District Court held that the Respondent was negligent in failing to bring his cruiser around (R. 131, 143). The Respondent had had a physical impairment since he was five years old and was required to wear a brace so that he could not jump overboard to save anyone (R. 55). The Respondent's captain, Mr. Rhoda, was a man 74 years old (R. 124), was hard of hearing (R. 125), and could not swim (R. 126).

There was conflicting evidence that the decedent remained in the water four or five minutes before he sank (R. 77, 124). The Cappy was then still 25 feet away (R. 48).

At the time of his death the earnings of the decedent were $15,000 per year (R. 136). The means of support left to his widow, the petitioner, however, consisted only of a small house and a checking account containing $337 (R. 79).

The Basis of the Court's Jurisdiction

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended, Title 28 U.S.C.A. sec. 347 (a).

The Federal statute claimed to have been erroneously construed is the Motor Boat Act of April 25, 1940, 46 U.S.C.A. § 526(a) *et seq.*

Questions Presented

We submit that this case presents the following questions of general importance in Admiralty which merit the attention of this Court:

1. Did the Circuit Court correctly state and apply to this case the law relating to the appellate review of a case in Admiralty in limitation of liability proceedings, decided by a District Court after trial in which the Court saw the witnesses and heard the testimony.

2. Did the Circuit Court rightly hold that there was sufficient evidence to support the District Court's denial of Respondent's claim for limitation of liability while at the same time dismissing the case on the ground that there was no evidence to support the findings or the decree.

3. Did the Circuit Court properly interpret and apply the law as to the character of the facts required to be stated in the findings of the District Court in an Admiralty case.

4. Should the Circuit Court have referred the case back to the District Court to state new findings instead of dismissing the case.

5. Did the Circuit Court correctly state the law relating to the risk assumed by the decedent in sitting in the after cockpit.

6. Did the Circuit Court correctly construe the *Motor Boat Act of April 25, 1940,* U.S.C.A. § 526(a) *et seq.,* in relation to the Respondent's duty to have the Cappy properly manned for the trip.

7. Did the Circuit Court correctly hold that if the Respondent, having used intoxicating stimulants excessively, erred at all in backing instead of turning the Cappy, the error was one of judgment and not of negligence.

8. Did the Circuit Court correctly state the law with respect to contributory negligence constituting a defence to a claim for a maritime tort resulting in death arising under a state statute which does not provide for such defence in its provisions.

Reasons Relied Upon for the Allowance of the Writ

1. The decision of the Circuit Court that it was required only to accord due weight to the findings and judgment of the District Court and that it was not bound to accept them, is submitted to be in direct conflict with the law applied in the following circuits which hold that the findings of a District Court in an Admiralty case rendered after a trial in which the court saw the witnesses and heard their testimony are binding upon the Circuit Court and shall not be set aside unless clearly erroneous.

Second Circuit:

Commercial Molasses Corp. v. *N. Y. Tank Barge Corp.,* 114 F. (2d) 248, 250 (1940), affirmed 314 U. S. 104;

Petterson Lighterage & Towing Corp. v. *N. Y. Cent. R. Co.*, 126 F. (2d) 992, 994 (1942);
The C. W. Crane, 155 F. (2d) 940, 941 (1946).

Third Circuit:

The Mamei, 152 F. (2d) 924, 926 (1945), cert. den. 328 U. S. 836;
The Cleary Bros. No. 61, 61 F. (2d) 393, 395 (1932).

Fourth Circuit:

Gatewood v. *Sanders*, 152 F. (2d) 379, 380 (1945), cert. den. 328 U. S. 848;
The Yomachichi, 74 F. (2d) 977, 979 (1935); 103 A. L. R. 768 and annotation at page 775.

Seventh Circuit:

The Marguerite, 140 F. (2d) 491, 495 (1944).

Ninth Circuit:

Portland Tug & Barge Co. v. *Upper Columbia River Towing Co., et al.*, 153 F. (2d) 237, 238 (1946);
The Shang Ho, 88 F. (2d) 42 (1937).

That there is confusion as to the duty of the appellate court on this subject clearly appears in this case in which the Circuit Court all in the same opinion, considers itself bound by some of the findings but not bound by the others although all of the findings were made by the District Court under the same conditions, that is, after seeing the witnesses and hearing their testimony.

The confusion arises from the different wording of *Admiralty Rule 46½* as amended in 1930, 28 U.S.C.A., following sec. 723, and *Rule 52 (a)* of the *Rules of Civil*

Procedure, 28 U.S.C.A., following sec. 723c. In the particular situation presented in this case there should be no difference in the application of the rules, as pointed out in several decisions of the Second Circuit, rendered by Judge Learned Hand, particularly in the case of the *Petterson Lighterage & Towing Corp., supra.*

After considerable search we believe that the law on this point has not been but should be settled by this Court although a very similar question, but not involving a limitation proceeding is presented in a petition for certiorari granted by this Court, on October 13, 1947, *Robert C. Johnson, Petr.* v. *United States,* No. 138, October Term, 1947.

2 The decision of the Circuit Court in affirming the lower court's denial of the petition for limitation of liability but at the same time dismissing the case for lack of evidence to support the findings is submitted to be contrary to the law of the Second Circuit which holds that the petition should be granted where absence of negligence is found

> *The 84—H,* 296 F. 427, 432 (C.C.A., 1923); cert. den. 264 U. S. 596.

The question of the proper disposition of a petition for liability under the circumstances in this case is of wide interest in Admiralty and since the decision of the Sixth Circuit has thrown the matter into confusion and seriously prejudices the rights of claimants, the matter calls for an authoritative decision by this Court.

3. The Circuit Court's repeated criticisms of the District Court's findings for failure to state facts which we submit are clearly evidentiary in nature, are contrary to the law of the Second, Third and Eighth circuits to the effect that the findings should be confined to the

ultimate facts and should not state the evidence or any of the reasoning upon the evidence.

Petterson Lighterage & Towing Corp. v. *N. Y. Cent. R. Co.*, 126 F. (2d) 992, 996 (C.C.A. 2, 1942);
Brown Paper Mills Co v. *Irvin*, 134 F. (2d) 337, 338 (C.C.A. 8, 1943);
Bowles v. *Cudahy Packing Co.*, 154 F. (2d) 891 C.C.A. 3, 1945).

4. The action of the Circuit Court in repeatedly criticising the sufficiency of the findings of the District Court and then dismissing the case without sending it back to the District Court to enable that court to make new findings is in conflict with the law of the Eighth Circuit.

Brown Paper Mills Co. v. *Irvin, supra,* at page 338.

This question would seem to us to be one of wide application in the law of appeal, and generally in the administration of justice. The duty of finding the facts under *Admiralty Rule 46½* is placed upon the court of first instance.

5. The Circuit Court's holding that the Respondent had the right to assume that the decedent would use ordinary care to protect himself under the circumstances of his disappearance from the after cockpit is contrary to the law of the Ninth and Second circuits and of the well reasoned decisions of other jurisdictions to the effect that the Respondent knowing of the danger the Respondent was in, and having ample opportunity to warn him or to turn back, did not do so and so failed in his duty to use ordinary care.

Weisshaar v. *Kimball S. S. Co.*, 128 F. 397, 401 (C.C.A. 9, 1904), cert. den. 194 U. S. 638;

The Arabic, 50 F. (2d) 96 (C.C.A. 2, 1931);
Parmelee v. *Hiller,* 129 Conn. 489, 491; 28 A. (2d) 586, 587, (Supreme Court of Errors, Conn., 1942);
Petition of Liebler, 19 F. Sup. 829 (D.C.W.D., N. Y., 1937);
Schaaf v. *Coen, Rec'r.,* 131 O. S. 279 (1936);
Puleo v. *H. E. Moss & Co.,* 159 F. (2d) 842 (C.C.A. 2, 1947).

It is also submitted to be contrary to the applicable law of this Court as expressed in *Chunn* v. *City & Suburban Ry.,* 207 U. S. 302, 309 (1907); *Leathers* v. *Blessing,* 105 U. S. 626, 629 (1881); *Best* v. *Dist. of Columbia,* 291 U. S. 411, 419 (1934).

6. The Circuit Court's holding that the Respondent under the circumstances was not required to anticipate the necessity of having a life guard as a member of the crew and as a matter of law was not required to have a crew at all, has decided an important question of admiralty law and construed a Federal statute, the *Motor Boat Act of April 25, 1940,* 46 U.S.C.A. sec. 526 (a) *et seq.,* contrary to the applicable law in that the requirement of seaworthiness is one applying equally to a private vessel and a common carrier, that the seaworthiness of the vessel is to be determined by the facts and circumstances of each particular case and that the requirement of seaworthiness with respect to the competency of the crew depends upon whether personnel is competent to perform the maritime services required.

The Linseed King, 24 F. (2d) 967 (D.C.S.D., N. Y., 1928); affirmed, *In re Spencer Kellogg & Sons, Inc.,* 52 F. (2d) 129 (C.C.A. 2, 1931); affirmed, *Spencer Kellogg & Sons, Inc.,* 285 U. S. 502 (1932);

Hartford & N. Y. Transp. Co. v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, 191 (C.C.A. 2, 1931), cert. den. 283 U. S. 835;
The Smyrna, 62 F. (2d) 1048, 1051 (C.C.A. 4, 1933);
The Maui, 113 F. (2d) 1018, 1020 (C.C.A. 9, 1940).

7. In holding that if the Respondent, having used alcoholic stimulant excessively, erred at all in backing instead of turning the cruiser, the error was one of judgment and not of negligence and that it does not appear that if he had turned that Dickie would have been saved, the Circuit Court has decided an important question of law which has not been but which should be decided by this Court and which it is submitted is contrary to the applicable decisions of this Court and of the Second and Fourth Circuits.

Lie v. *San Francisco & P. S. Co.*, 243 U. S. 291 (1917);
The Pennsylvania, 19 Wall. 125, 136 (1873);
The E. Madison Hall, 140 F. (2d) 589, 591 (C.C.A. 4, 1944);
The N. Y. Marine No. 10, 109 F. (2d) 564, 566 C.C.A. 2, 1940);
The Silver Palm, 94 F. (2d) 754, 759 (C. C. A. 9, 1938).

8. In holding that under the Ohio Lord Campbell's Act under which Petitioner's action is instituted the defence of contributory negligence is available, the Circuit Court decided a question of wide importance in Admiralty and contrary to the applicable law of this Court which is to the effect that in a death action for a maritime tort on navigable waters within the jurisdiction of a state which under the state law survives death, the action also survives in Admiralty and the principles and rules of the

maritime substantive law are alone to be applied in determining the rights and obligations of the parties and may not be modified by the law of the state.

Kellogg & Sons v. *Hicks*, 285 U. S. 502, 513 (1932);
Robins Dry Dock & Repair Co. v. *Dahl*, 266 U. S. 449 (1925);
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372 (1918);
J. H. Burton & Sons v. *May*, 212 Ala. 435 (1925); 1925 A.M.C. 707;
Joyce v. *Convoy S. S. Co.*, 1 F. (2d) 482 (D.C. Maine, 1924).

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be granted

SILAS B. AXTELL,
GORDON, TODIA & SWEENEY,
Proctors for Appellee.

MYRON SCOTT,
of Counsel.

Supreme Court of the United States

October Term, 1947. No. ....

Lucile P. Dickie, Executrix of the Estate of James S. Dickie, Deceased,

Petitioner,

v.

Gene C. Hutchinson,

Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Opinions of the Courts Below

The opinion of the Sixth Circuit Court of Appeals (R. 160, was filed June 5, 1947, and the order of said court denying the petition for a rehearing, timely filed on June 20, 1947 (R. 169), was filed July 21, 1947 (R. 195).

The opinion of the Sixth Circuit Court of Appeals is reported in 162 F. (2d) 103. The decision on the rehearing is not yet reported.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, was announced orally (R. 127), on October 18, 1946, and is reported in 1947 A.M.C. 103. Findings of fact and conclusions of law of the District Court were filed November 4, 1946 (R. 142).

Specification of Errors

1. The Circuit Court of Appeals for the Sixth Circuit erred in making the following ruling (R. 167):

> "We recognize the correctness of the rule that we should accord due weight to the findings and judgment of the court, but we are not bound to accept them. *Kellogg S. S. Corp.* v. *Belcher Oil Co.*, 126 Fed. (2d) 18, 19 (C.C.A. 5)."

2. The Circuit Court of Appeals for the Sixth Circuit erred in making the following ruling (R. 160):

> "We think there was sufficient evidence to support the court's denial of appellant's claim for limitation of liability under the statute above cited and nothing more need be said upon that feature of the case."

while at the same time making the following ruling (R. 167):

> "We are required to examine the record and determine for ourselves whether it fairly supports the findings. This we have done, minutely; and our conclusion is that there is no evidence to support either the findings in the matter above indicated or the decree."

3. The Circuit Court of Appeals for the Sixth Circuit erred in making the following rulings:

> "But the court does not find either in the findings or in the record anything to indicate that the disabilities of appellant and Rhoda, or either of them, affected the rescue measures or contributed to Dickie's death" (R. 164).

> "There is in evidence a statement made by Smith to Mrs. Dickie in the presence of appellant, that he,

Smith, saw Dickie go overboard, 'that he sort of arose and his feet were bothering him.' This fact was not referred to in the findings" (R. 165).

"The court did not, either in the opinion or the findings, make reference to what we regard as relevant and undisputed facts. They are, that appellant, at the controls, saw Dickie sitting in the cockpit of the cruiser talking through the door to Smith, who was sitting in the cabin, about two or three minutes before he heard the cry 'Man Overboard'; that when he heard the cry he immediately reversed the motors, looked back and within a matter of a few seconds he saw a person's head on the surface of the water" (R. 165).

"Moreover, there is no finding that appellant's drinking, or physical condition, contributed in the least to the unsuccessful effort to rescue Dickie" (R. 166).

4. The Circuit Court erred in reversing the judgment and dismissing the case (R. 168), rather than sending the case back to the District Court to make new findings.

5. The Circuit Court erred in making the following ruling (R. 165):

"Under these circumstances we think that appellant had a right to assume that Dickie would use ordinary care to protect himself * * *."

6. The Circuit Court erred in making the following ruling (R. 165):

"* * * it was not required of appellant to anticipate the necessity of having a life guard as a member of the crew. As a matter of law, appellant was not required to have a crew at all. He was not even required to have a license."

7. The Circuit Court erred in making the following ruling (R. 167):

> "We think that if appellant erred at all in backing instead of turning the cruiser, the error was one of judgment and not of negligence. Further, we think an insurmountable objection to the judgment in appellee's favor is the entire lack of evidence that anything appellant did or left undone caused his efforts at rescue to fail. It does not appear that if appellant had turned the cruiser instead of backing it, Dickie would or should have been saved. *Ford* v. *Trident Fisheries Co.*, 232 Mass. 400, 402."

8. The Circuit Court erred in making the following ruling (R. 167):

> "Appellee's action is predicated upon the Ohio Death Statute or 'Action for Wrongful Death' (Sec. 10509-166; *Feige* v. *Hurley*, 89 Fed. (2d) 575 (C.C.A. 6)), under which the defense of contributory negligence of decedent is available * * *."

9. The Circuit Court erred in making the following ruling (R. 163):

> "But there is no evidence that he was caused to disappear from the cruiser by any act of negligence or misconduct of appellant who was steering the cruiser at the time, or by any misconduct or negligence of one Rhoda, the sole member of the crew, or by any defect in the construction of the cruiser."

THE ARGUMENT

1. The Circuit Court's holding that it was required only "to accord due weight to the findings and judgment of the District Court but that it was not bound to accept them" is submitted to be directly contrary to the correct interpretation of Admiralty Rule 46½ which is to the effect that findings of fact in an admiralty case rendered after trial in which the court saw the witnesses and heard their testimony are binding upon the appellate court and are not to be set aside unless clearly erroneous.

In *Commercial Molasses Corp* v. *N. Y. Tank Barge Corp., supra,* Judge Learned Hand stated that in a case in which the evidence was evenly matched Admiralty Rule 46½ did not lay down the measure of conclusiveness of the findings but that it prescribed nothing different from Rule 52(a) of the Rules of Civil Procedure, and upheld the findings in that case as not "clearly erroneous", the language used in Rule 52(a).

In the case of *Petterson Lighterage & T. Corp.* v. *N. Y. Cent. R. Co., supra,* Judge Learned Hand considerably developed and explained this thesis, stating that although findings in Admiralty were a novation in 1930 when Admiralty Rule 46½ was amended, the procedure in substance was very old and that the change merely recognized a point thoroughly well established.[4]

The decisions of the Third, Fourth, Seventh and Ninth Circuits, cited *supra,* pages 10-11, are also to the effect that in the situation presented in this case of findings

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[4] We do not go so far as to maintain as does Judge Hand that "not much of any practical importance survives of the doctrine that an appeal in admiralty is a new trial," as for instance, see *Lagnes* v. *Green,* 282 U. S. 531, 535 (1931). Judge Hand's ruling on the point here in issue and his reasoning in support thereof appear to us to be sound, however.

on conflicting evidence after the trial court saw and heard the witnesses, the findings may not be set aside "unless clearly erroneous", or "unless clearly wrong", or "unless the record reveals plain error". The rule of Admiralty that an appeal is a trial *de novo* does not apply in such a situation.

The prejudice to the Petitioner's case in the application to a great part of the District Court's findings of the review procedure as in trial *de novo,* is clear. It enabled the Circuit Court to strike down two main grounds of Petitioner's judgment, to-wit: unseaworthiness of the vessel and unseaworthiness in the manning of the vessel without any showing of clear error.

The prejudice goes even further and affects a question which the Circuit Court considered as matter of mixed fact and law. For instance, and merely as an example lest we enter into a dispute over the evidence: The Circuit Court states in its opinion (R. 167): "However the court found that the appellant failed to make a reasonable effort to rescue decedent. The court did not point out what it had in mind by the term 'reasonable effort' and the record does not disclose any particular thing or things that appellant did or failed to do which proximately caused the death of Dickie." The Circuit Court here is again referring to finding number five, which also finds that the Respondent saw Dickie when Dickie was only 75 feet away from the Cappy. This taken in connection with the conflicting evidence to the effect that Dickie "stayed up" four or five minutes before he sank (R. 77, 124) may be taken to mean that the court resolved this conflict in favor of the claimant and that the District Court did not believe that it was reasonable for the Respondent to use up more than four or five minutes even in backing under those circumstances.

The real reason for the application to a great part of Petitioner's case of review procedure as in trial *de novo,*

seems to have been the lack of evidentiary facts in the findings, since the Circuit Court repeatedly complains of the findings on this ground. We have been unable to find any authority supporting a review *de novo* under such circumstances. On the contrary, and as we show in Point 3, *infra,* evidentiary facts are not required at all in the lower court's findings.

2. In affirming the lower court's denial of the petition for limitation of liability but at the same time dismissing the case, the Circuit Court has created a hiatus impossible to reconcile and contrary to sound law and practice in Admiralty.

In affirming the denial of Respondent's petition, the Circuit Court stated that "there was sufficient evidence to support the court's denial of appellant's claim for limitation of liability" (R. 160). The *Limited Liability Act,* 46 U.S.C.A. § 181 *et seq.,* does not impose liability but does limit a liability assumed already to exist on other grounds. *The Titanic,* 233 U. S. 718, 733 (1914). If the court finds liability but no privity on the part of the owner, it grants the petition. If the court finds liability and privity thereto on the part of the owner, it denies the petition. If the court finds no liability irrespective of privity it grants the petition, the monition and injunction remain in force and the case is disposed of. *The 84-H, supra.*

The District Court tried the issues of negligence both as to the issue of the right to limit liability and as it concerned the right of the claimant to damages, at the same time (R. 70, 132), holding that there was such negligence as to each issue and dismissing the petition for liability (131).

In view of the fact that the Circuit Court's opinion is largely directed to the insufficiency of the lower court's

findings of fact, the Circuit Court may be taken to have decided that there was negligence to deny a petition for limitation of liability but not sufficiently stated in the findings to support an award of damages.

This view leaves claimant Mrs. Dickie's case only partially decided. It raises the question whether the Petitioner may now bring an independent suit for her damages and on the same or possibly some other grounds which the Circuit Court saw but did not point out. This manifest state of confusion we submit requires an authoritative statement to be made by this Court.

3. The Circuit Court's repeated criticisms of the lower court's findings for failure to state facts which we submit are clearly evidentiary in nature are contrary to the law of the Second, Third and Eighth circuits that the findings should be confined to the ultimate facts and should not state the evidence or any of the reasoning upon the evidence.

The criticisms of the findings are specifically shown in assignment of error number 3, *supra,* page 17. To us they clearly indicate the court's belief that evidentiary facts should have been stated. In point 2 we have given an example of how prejudicial can be a requirement that evidentiary facts must be stated in the findings. We could give other examples, particularly with respect to unseaworthiness of the vessel and unseaworthiness with respect to the vessel not being properly manned.

It is not surprising that to an Admiralty bar accustomed to a trial *de novo* upon appeal, after ten years of struggling with the requirement of findings, the requirement should be burdensome, nor that a committee of this bar should ask this Court to allow the District Court's opinion to stand for the findings. *Benedict on Admiralty,* Sixth Ed., Index Vol., page 164.

Two years later, in *Petterson Lighterage and T. Corp. v. N. Y. Cent. R. Co., supra,* Judge Learned Hand stated, page 996:

> "The judge wrote an opinion, discursive as an opinion, should be, showing by what reasoning the evidence had brought him to his conclusions. In it he very properly did not separate the ultimate facts from their foundation or from the processes used to arrive at them; but the findings, obviously prepared by counsel, are not really findings at all. They are merely the opinion cut up into sections and numbered; they add nothing to the original. Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law. It is apparently impossible to expect this from counsel; and we are indeed aware that the requirement adds perceptibly to the judge's labors. Nevertheless, we are not convinced that if prepared along with the opinion, if limited in number to disputed issues, and if confined to the ultimate facts, their preparation will prove as serious a burden as is sometimes supposed; and certainly, if so prepared, they will prove of much value in the administration of justice, and will incidentally greatly increase the finality of the decisions of the district court."

That the findings should be limited to the ultimate facts was the solution to the burden suggested by Judge Learned Hand and we submit that the findings as made by the District Court in this case state the ultimate facts of the case. The Circuit Court's refusal to find evidentiary support for the findings where not specifically stated in them was not only extremely prejudicial to the claimant's case but is contrary to sound practice and will be a source of much confusion in the future.

4. The action of the Circuit Court in repeatedly criticising the sufficiency of the findings and dismissing the case without sending it back to the District Court to enable that court to make new findings is in conflict with the law of the Eighth Circuit which we submit is the better practice and one more calculated to do justice between the parties.

In the case of *Brown Paper Mills Co.* v. *Irvin, supra,* the court stated, page 338:

> "To enable the court below to make proper findings of the ultimate facts and proper conclusions of law, as required, by Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, the judgment appealed from is vacated, and the case is remanded with directions to set aside the present findings of fact and conclusions of law, to make new findings of fact and conclusions of law, and to enter a judgment in conformity therewith."

Failure of the Sixth Circuit Court to follow this practice of the Eighth Circuit, we submit has lead the Court into the untenable position pointed out above, *i.e.,* holding that there was sufficient evidence to support the court's denial of the petition for limitation of liability, but at the same time criticising the findings for lack of detail and then dismissing the case for lack of evidence to support the findings.

5. The Circuit Court's holding that the Respondent had the right to assume that the decedent would use ordinary care to protect himself under the circumstances of his disappearance from the after cockpit is contrary to the law of the Ninth and Second circuits and of the well reasoned decisions of other jurisdictions in that the Respondent, knowing of the danger the Respondent was in and having ample opportunity to warn him or to turn back, did not do so and therefore failed in his duty to use ordinary care.

The circumstances under which the decedent disappeared from the after cockpit which the Circuit Court mentions in its opinion, were: The Respondent at the time was operating the 38 foot cruiser Cappy (R. 165); the decedent was sitting quietly in one of the chairs in the after cockpit talking with Smith through the open cabin door[5] (R. 165); the Respondent saw him sitting there two or three minutes before the cry "man overboard" (R. 165); the decedent was 63 years old, had defective vision (R. 165); at the time of the accident the decedent arose and his feet were bothering him[6] (R. 165); when the Cappy left the Lakeside Yacht Club and proceeded out of the harbor entrance and into Lake Erie, about half a mile, there was a northeast wind[7] and a sea running at the time which gave the boat quite a roll (R. 161); the excessive use of alcoholic stimulants by the

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[5] The Respondent testified on direct examination that the cabin door had been locked open so that it would not swing (R. 43).

[6] The Circuit Court fails to mention that in the very next sentence the same witness gives the probable reason that Mr. Dickie was lame (R. 76). It was alleged and admitted in the pleadings that Dickie arose from his chair and fell over the port side (R. 2, 15).

[7] Respondent's counsel proved that the wind velocity had risen steadily from three miles per hour at two o'clock to fourteen miles per hour at seven o'clock (R. 68).

Respondent and the physical incapacity of both the Respondent and his captain Rhoda (R. 164).

This is not a situation in which adequate warning had been given to the decedent against sitting in the after cockpit, as in the case of *Erdman* v. *U. S., et al.*, 143 F. (2d) 198 (C.C.A. 2, 1944), cert. den. 323 U. S. 769. On the contrary, the open cabin door to the after cockpit and the chairs in the cockpit are submitted as constituting an implied invitation to the members of the party to sit there and use it. In fact, Respondent admitted on cross examination that no warning at all was given to his guests to keep their feet in the seaway (R. 61, 65).

But even overlooking this important detail, the Respondent still had time after reaching the open lake and noticing the sea running there at the time[8] to warn Mr. Dickie or to turn back since the Respondent saw Mr. Dickie sitting in the after cockpit three or four minutes before the accident and failed therefore in his duty to use ordinary care. *Weisshaar* v. *Kimball S. S. Co., supra; The Arabic, supra; Schaaf* v. *Coen, Rec'r, supra; Chunn* v. *City & Suburban Ry., supra.*

Surely the Circuit Court cannot mean that the Respondent had the right to assume that Mr. Dickie at his age of 63, with his weak eyes and lame leg would stay up more than four or five minutes in the cold September waters of Lake Erie while Respondent backed 75 feet to rescue him.

If on the other hand the Circuit Court meant that the decedent assumed the risk of being thrown overboard, there is no proof anywhere in the record to show that the decedent knew of the danger. In fact the Circuit Court itself negatives any such knowledge by stating that Mr.

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[8] Respondent slowed down from twelve to eight miles per hour on reaching the lake because of the rough sea (R. 63).

Dickie was sitting "quietly" in the after cockpit talking to Mr. Smith, which would seem to be conduct negativing any awareness of danger.

It is submitted that the decedent could not have known of the danger in sitting in the after cockpit while going down the quiet waters of Cleveland Harbor. It is submitted that he could not have known of that danger until the Cappy proceeded beyond the breakwater into Lake Erie. Probably he did not realize his peril until he arose from his chair and fell over the port side and then, probably, he was trying too late to reach the safety of the cabin.

The decedent could not have known what the Cappy would do because he had never ridden in the Cappy before (R. 61). He did not spend time on various vessels and was strictly an office man (R. 82). He had only a canoe and a rowboat (R. 90, 92).

On the other hand the Respondent did know what the Cappy would do because he had been sailing the Cappy for the sailing seasons of the previous four years and would not let his own children ride alone in the after cockpit (R. 36). He knew that the Cappy would lurch or roll enough to throw a man overboard (R. 65).

Although the Respondent "couldn't see that it was necessary" to give such warning (R. 61), that does not excuse him. *Parmelee* v. *Hiller, supra; Petition of Liebler, supra; Warnken, et al.* v. *Moody, et al.*, 22 F. (2d) 960 (C.C.A. 5, 1927); *The Inga*, 33 F. Supp. 122 (D.C.S.D., N. Y., 1940).

There can be no question but that the Respondent owed the decedent the duty to use reasonable care. *Best* v. *Dist. of Columbia*, 291 U. S. 411, 419 (1934); *Leathers* v. *Blessing*, 105 U. S. 626, 629 (1881); *Puleo* v. *H. E. Moss & Co., supra; American Steel & Wire Co.* v. *Sieraski*, 119 F. (2d) 709 (C.C.A. 6, 1941).

6. The Circuit Court in holding that the Respondent under the circumstances was not required to anticipate the necessity of having a life guard as a member of the crew and as a matter of law was not required to have a crew at all, has decided an important question of maritime law and construed a Federal statute probably contrary to the applicable decisions of this Court, in that the requirement of seaworthiness is one applying equally to a private yacht and a common carrier, that the seaworthiness of a vessel is to be determined by the facts and circumstances of each particular case, and that the requirement of seaworthiness with respect to the competency of the crew depends upon whether the personnel is competent to perform the maritime services required.

The Federal statute involved is the *Motor Boat Act of 1940*, 46 U.S.C.A. § 526 (a) *et seq.* Even the Cappy was subject to the provisions of Section 526 (l) of this Act which prohibit reckless and negligent operation. Compliance or non-compliance with that statute, however, would not absolve the Respondent from liability for negligence as judged by the common law of the sea. 33 U.S.C.A. § 351.

This very defence of lack of statutory restrictions governing operation, although arising under the *Motor Boat Act of 1910*, was presented in the case of *The Linseed King*, 24 F. (2d) 967 (D.C.S.D., N. Y., 1928); affirmed on other grounds, *In re Spencer Kellogg & Sons, Inc.*, 52 F. (2d) 129 (C.C.A. 2, 1931); affirmed 285 U. S. 502. The defence was overruled, the court stating, page 970:

> "Since she did not transport passengers for hire, she was not subject to regulation by the United States local inspectors, aside from the requirement (Motor Boat Act of 1910 (46 U.S.C.A. §§ 511-519; Comp. St.

> §§ 8277-8281, 8283-8286)) that life preservers be carried for every person on board. * * * No difference exists, as to unseaworthiness, between private and common carriers, or as to whether a cargo consists of merchandise or passengers, since in each instance, a seaworthy boat must be used. The Linseed King must have been fit to carry her passengers for the particular transportation; for, if she lacked reasonable fitness, staunchness, and sufficiency, she was unseaworthy. * * * The rule is that reasonable fitness or seaworthiness of a vessel must be tested, as said in *The Benjamin Noble* (C.C.A.) 244 F. 95, by the facts and circumstances of each particular case, * * *."

and at page 974:

> "Nor does the license (Exhibit S), issued by the Bureau of Navigation, stating 'number of crew, 1,' operate to exhonerate petitioner from blame for insufficiency of crew, in view of the fact that it was manifest that a larger crew was necessary."

In the case of *Hartford & N. Y. Transp. Co.* v. *Hubbard Co., supra,* Judge Learned Hand stated at page 191: "Seaworthiness in respect to the crew of a vessel depends on whether the personnel is competent to perform maritime services and not on certificates."

In *The Maui, supra,* the court stated, page 1020: "Whether the Maui was seaworthy for the purpose of the port maneuver is to be determined from the nature of the maneuver."

In *Spencer Kellogg & Sons* v. *Hicks,* 285 U. S. 502, 511, it was held that a launch that was seaworthy when there was no ice in the river was not seaworthy when there was ice in the river.

The question then is was the Cappy seaworthy for the trip down Lake Erie on that particular evening of September 20, 1943, with a northeast wind blowing at fourteen miles per hour velocity, with a sea running, with a length of 38 feet and a shallow cockpit, considering the physical incapacity of both the respondent and the captain, Rhoda, and the excessive use of alcoholic stimulants by the Respondent during the course of the afternoon.

It is this question that must be considered regardless of any lack of statutory governing restrictions. The reliance upon that lack by the Circuit Court in relieving the Respondent of liability for negligence is submitted to be a construction of the *Motor Boat Act of 1940* contrary to the purpose and intent of that act.

7. In holding that if the Respondent, having used intoxicating stimulants excessively, erred at all in backing instead of turning the cruiser, the error was one of judgment and not of negligence and that it does not appear that if he had turned that Dickie would have been saved, the Circuit Court has decided an important question of law which has not been but which should be decided by this Court and which is submitted to be contrary to the applicable decisions of this Court and of the Second and Fourth Circuits.

The Circuit Court in reversing the District Court's finding of negligence in backing instead of turning the cruiser relied on the testimony of Capt. Gould as stating (R. 166):

> "To the contrary, Capt. Gould, a retired merchant marine inspector, testified that he would have turned the Cappy around and ordinarily we would be compelled to accept the court's finding as true, but Capt. Gould put his finger on the critical point when he said that in case of a tragedy or accident at sea a

capable steersman will do the first thing that he thinks will help or do the most good."

The Captain here, as the context clearly shows (R. 124), was not referring to what actually happened in this case but merely to the general abstract principle in *vacuo*, which all can agree with but which does not advance the decision in this case. The question still remains as to what that capable steersman would have done under the circumstances of this case.

What the Captain considered important in this case, was the direction of the wind (R. 121). The testimony was undisputed that with the wind at a velocity of fourteen miles on Lake Erie, there would be waves three or four feet high with a distance of eight or nine feet between them (R. 114).

The question then is whether the Respondent did what a capable steersman would have done. Would that capable steersman have backed into such a wind and such a sea? Would he have done so if he was afraid of racing his propellers as was the Respondent (R. 63)? Would he have backed more than 50 feet?

That a capable steersman would not have done so and that the the Respondent's excessive use of alcoholic stimulants was responsible for his failure in this respect was the conclusion of the District Court, and we also submit that it is merely begging the question to state as the Circuit Court did (R. 167), that "it does not appear that if appellant had turned the cruiser instead of backing it, Dickie would have been saved." The Circuit Court stumbled into the very error of which it accused the District Court, *i.e.*, that of speculation and conjecture (R. 167). Manifestly the Circuit Court cannot say that if there had not been an excessive use of alcoholic stimulants by the Respondent, the Respondent would not have turned

back on reaching the rough water or would not have warned the decedent against sitting in the after cockpit, or would have backed instead of turning.

The factor of Respondent's excessive use of alcoholic stimulants which the Circuit Court recognized, and the Respondent's assumption of the operating controlls of the cruiser under such circumstances, we submit constitute negligent operation and the Respondent is under the duty of proving not only that his excessive use of stimulants did not, but that it could not have contributed to the accident. *Lie* v. *San Francisco & P. S. Co., supra; The Pennsylvania, supra; The E. Madison Hall, supra; The N. Y. Marine No. 10, supra; The Silver Palm, supra.*

The cases just cited are all cases where this principle was invoked because of a failure to observe a statutory requirement. In 46 U.S.C.A. § 526 (l) there are provisions prohibiting negligent operation of a motor boat in general terms. In 46 U.S.C.A. § 404 there are provisions for the revocation of licenses of operators of small boats carrying passengers for hire on the ground of intemperance. Analagous are the provisions of the Ohio Statutes making it an offence to drive a motor vehicle while under the influence of alcohol. *Page's Ohio General Code,* Annotated, Vol. 5, Sec. 6296-30 (c).

The excessive use of alcoholic stimulants by operators of vessels, in other words, is a recognized fault and indicative of the broad scope of 46 U.S.C.A. § 526 (l). *Feige* v. *Hurley,* 89 F. (2) 575, 577 (C.C.A. 6, 1937).

8. In holding that under the Ohio Death Statute (R. 193), under which the Petitioner's action is maintained, the defence of contributory negligence is available, the Circuit Court has decided a question of wide importance in admiralty and contrary to the applicable decisions of this Court which are to the effect that a death action for a maritime tort in navigable waters within the jurisdiction of a state which under the state law survives death, survives also in admiralty and the principles of maritime substantive law alone are to be applied in determining the rights and obligations of the parties and may not be modified by the law of the state.

The case relied upon by the Circuit Court in stating that the defence of contributory negligence is available, *Feige* v. *Hurley,* 89 F. (2d) 575 (C.C.A. 6, 1937), is a decision by the same judge who wrote the opinion for the Circuit Court in this case. This case which concerns a Kentucky statute, is to the effect that the right of action being conferred by the state, such right is enforced in admiralty according to the principles of the common law of the state, and that unless contributory negligence has been abolished as a defence by the state, such defence is a bar to the action.

There is apparently no dispute here over the point that an action for personal injuries or death within the boundaries of a state which under state law survives death survives also in admiralty. *Just* v. *Chambers,* 312 U. S. 383 (1940).

The big question is whether such right is enforced according to the principles of the common law or according to the principles of admiralty, and the Circuit Court's decision on this point is submitted to be contrary to the decisions of this Court in *Kellogg & Sons* v. *Hicks, supra;*

Robins Dry Dock & Repair Co. v. *Dahl, supra; Chelentis* v. *Luckenbach S. S. Co., supra.*

In *Kellogg & Sons* v. *Hicks,* this Court in an appeal from a limitation proceeding began in the District Court for the Southern District of New York upheld claims for damages for wrongful death under a New Jersey statute, against a contention that since the New Jersey statute created the action, the New Jersey Workmen's Compensation law should be applied. This Court held, pages 513-514 that the compensation act was inapplicable and that the injured person is entitled to his remedy under rules recognized in admiralty.

In *Robbins Dry Dock & Repair Co.* v. *Dahl,* this Court reversed a verdict for the plaintiff because of an instruction of a trial court that the jury could consider the effect of a state statute (Section 18 of the N. Y. Labor Law) in deciding the question of negligence.

We submit that there is no distinction between the application of a statutory law of a state and the application of the common law of a state as in the case of contributory negligence in this case. It was only the common law remedy that was saved under *Section 9 of the First Judiciary Act of 1789,* 28 U.S.C.A. § 41 (3). *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372 (1918); *J. H. Burton & Sons* v. *May,* 212 Ala. 435; 1925 A.M.C. 707 (1925).

The Lord Campbell's Act of the State of Ohio (R. 193), under which this claim is brought does not expressly make contributory negligence a bar to the cause of action for wrongful death which it gives, and under these facts the admiralty court enforces the statute by applying to any contributory negligence that is proved, the substantive maritime law of comparative damages. *Joyce* v. *Convoy S. S. Co.,* 1 F. (2d) 482 (D.C.S.D. Maine, 1924); *The Max Morris,* 137 U. S. 1, 14 (1890).

Conclusion

We respectfully submit that the decision of the Sixth Circuit Court of Appeals in this case raises several questions of much public importance and that the decision on such questions is contrary to the applicable decisions of this Court and the better reasoned decisions of the other circuit courts; and that the attention of this Court is necessary to protect the uniformity of the admiralty law and the certainty of its application.

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 410.

LUCILE P. DICKIE,
Executrix of the Estate of James S. Dickie, Deceased,
Petitioner,

vs.

GENE C. HUTCHINSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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GENE C. HUTCHINSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATURE AND ORIGIN OF CASE.

The single issue involved in this litigation is whether or not the drowning of Petitioner's decedent was proximately caused by Respondent's negligence. After "minutely" examining the record, three Judges of the Circuit Court found no evidence to support the findings or the decree of the District Court and "found no actionable negligence on the part of appellant (Respondent)" (R. 167, 168).

On September 20, 1943, Petitioner's husband, James S. Dickie, decedent, while a social guest on Respondent's yacht Cappy, during a cruise on Lake Erie, fell overboard and drowned. Petitioner, as Executrix, made claim upon Respondent for wrongful death damages. Thereupon, Respondent filed his petition in the District Court for limitation of liability in accordance with the provisions of the Act of March 3, 1851, as amended, 46 U. S. C. A., §§ 183-185, sometimes referred to herein as Shipowners' Limited Liability Act. In that proceeding, Petitioner filed claim for damages and answer challenging Respondent's

right to limit. In due course, Respondent's petition and Petitioner's claim were heard on the merits by the District Court and that Court entered a final decree awarding Petitioner damages in the sum of $30,000. Respondent appealed to the Circuit Court where the decree was reversed.

COUNTER-STATEMENT OF FACTS.

Petitioner's statement being inaccurate in many particulars, and having omitted several material facts, Respondent deems it necessary to make a brief statement of the facts.

Petitioner's decedent, a resident of Cleveland, was Vice President of the American Ship Building Company, whose business is the construction and repair of vessels (R. 39, 40). Educated at Glasgow University, from which he received the degree of naval architect, decedent spent his entire adult life in the shipbuilding industry (R. 71, 82). Respondent, likewise a resident of Cleveland, is a partner of Hutchinson & Company, whose business is the management of Great Lakes vessels (R. 35). Decedent and Respondent had known each other for about ten years (R. 39).

Respondent's yacht Cappy was a standard 38′ Matthews cruiser equipped with two engines and having twin screws. The cabin, which was located amidships, and in which the engine controls and steering wheel were situated, seated about eight people. Aft of the cabin was the cockpit, having guard rails and stanchions on each side and a minimum depth of 2′ 6″ at the stern. Chairs were placed in the cockpit for the convenience and pleasure of Respondent's family and guests (R. 36, 37, 38, 42).

At noon, September 20, 1943, decedent and Respondent met at Allendorf's restaurant in downtown Cleveland and, with two other friends, had lunch (R. 40, 52). During lunch Respondent invited decedent and the other men for a cruise that afternoon in the Cappy (R. 40).

Respondent kept the Cappy at the Clifton Lagoon in Rocky River, some ten miles to the westward of downtown Cleveland (R. 52, 54). From Allendorf's Respondent and his guests proceeded to Clifton Lagoon by automobile (R. 40).

Because the channel at Clifton Lagoon was temporarily obstructed by a derrick scow, there was some delay in the commencement of the cruise (R. 41). However, about 4:30 P. M. the cruise was begun (R. 42). Respondent operated the controls and handled the Cappy from her mooring berth into Lake Erie (R. 42). It was his practice to handle his own boat (R. 36) and he was considered a good yachtsman (R. 89). Out in the lake, Respondent turned the steering wheel over to Rhoda (R. 42). Rhoda was not the captain of the Cappy as claimed by Petitioner, but was employed on occasion to assist Respondent in the upkeep and handling of the Cappy (R. 40).

On Lake Erie the wind was light northerly with some sea running, the maximum wind velocity for the day being about 14 miles per hour (R. 43, 68). As the Cappy entered Cleveland Harbor, Respondent again took the wheel and navigated the Cappy through the harbor to Lakeside Yacht Club which is located near East 49th Street (R. 42).

There was occasional drinking by the party. Both the District Court and the Circuit Court found that 5 to 6 drinks had been served within a period of four to five hours (R. 143, 166).

After spending about 45 minutes at Lakeside Yacht Club, the Cappy commenced the return run to Rocky River (R. 43, 101). Respondent handled the Cappy (R. 105). Leaving Cleveland Harbor all members of the party were in the cabin except decedent who sat in a chair on the port side of the forward end of the cockpit, where, through the open cabin door, he conversed with one of the other guests (R. 45, 46). Reaching the lake, the Cappy headed into the sea and wind and her speed was reduced from about 12

miles per hour to about 7 or 8 miles per hour (R. 62). After running into the wind and sea in a northerly direction for a distance of about one-half mile, the Cappy squared away to westward for the Rocky River Harbor Entrance (R. 44). At that time, Respondent observed that decedent was still seated in the chair in the cockpit (R. 45).

Some few minutes after the Cappy was squared away for Rocky River, someone called "man overboard" (R. 46). Immediately looking aft, Respondent saw decedent in the water over the port quarter at a distance of about 75′ to 100′ (R. 46). Simultaneously, Respondent reversed the motors of the Cappy to full speed astern, stopped the Cappy's headway, brought the Cappy astern and kept a close lookout for decedent (R. 46, 47).

Two life rings aft, held in racks, one on each side of the cabin, were thrown in rapid succession by Rhoda to decedent. The first landed within 20′ of him and the other within 6′ (R. 46, 47). Although decedent was afloat, he made no apparent effort to reach either life ring (R. 47). After throwing the two life rings to decedent, Rhoda went forward around the outside of the cabin to get a boat hook (R. 47, 48). Meantime, respondent remained at the controls and continued to bring the Cappy astern so that decedent would be kept in sight and would first be reached from the cockpit, the only place from which he could be rescued (R. 47, 61). However, when the Cappy was within about 20′ of decedent, and before Rhoda was able to return with the boat hook, decedent sank and disappeared from view (R. 48).

Not more than three or four minutes elapsed between decedent's fall overboard and his sinking (R. 133). Within a few minutes a Coast Guard picket boat joined the Cappy in the search for decedent which continued until about dusk (R. 49). Respondent then went to the Coast Guard Station in Cleveland outer harbor and made report of decedent's drowning (R. 49). After making the report, Re-

spondent returned to Clifton Lagoon and immediately went to Petitioner's house, where he informed her of decedent's drowning (R. 49).

REASONS FOR DENYING THE PETITION.

(1) No federal statute was erroneously construed.

(2) No question of law is presented for consideration by this Court.

(3) Petitioner has set forth no sound reason for the allowance of the writ.

ARGUMENT.

(1) No Federal Statute Was Erroneously Construed.

The issue as to Petitioner's right to recover damages in the lower courts involved no statutory fault on Respondent's part. Petitioner pleaded no statute in her claim or answer filed in the District Court. Nor did she claim that any statute was violated. It was uncontradicated that neither by Act of Congress nor by regulation was there any requirement for the crewing of a pleasure yacht such as the Cappy.

There was no occasion for a construction by the courts below of the Motor Boat Act of 1940; 46 U. S. C. A. §§ 526-526t. That act (1) classifies motor boats up to 65′ in length (2) prescribes for them lights, life preservers and other safety appliances and (3) establishes penalties for violation of the requirements of the Act. No evidence was offered to show any violation of that Act for the reason that there was no such violation. Petitioner refers to paragraph 526*l* which reads:

> "526*l*. Reckless or negligent operation of vessels; prohibition.
>
> No person shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person. Apr. 25, 1940, c. 155, § 13, 54 Stat. 166."

The Circuit Court found that there was no negligence on Respondent's part. The first attempt to inject the Motor Boat Act occurred in the brief supporting the petition for rehearing in the Circuit Court.

(2) No Question of Law is Presented for Consideration By This Court.

The proceedings in the District Court presented two issues for determination, i.e., the right of Respondent to limit his liability and the right of Petitioner to wrongful death damages. In the courts below Petitioner challenged Respondent's right to limit liability and was sustained by both courts. Clearly there is no necessity for this Court to review the decisions on this issue.

With respect to Petitioner's right to recover damages, the Circuit Court, purely on a factual consideration, reversed the District Court on the ground that it found "no actionable negligence on the part of appellant (Respondent)" (R. 168). The Circuit Court's decision involved no contested questions of law and presents no question of law for consideration by this Court.

(3) Petitioner Has Set Forth No Sound Reason For the Allowance of the Writ.

Petitioner's First Reason: In reviewing the record in this case the Circuit Court said (R. 167):

> "• • • We recognize the correctness of the rule that we should accord due weight to the findings and judgment of the Court, but we are not bound to accept them."

Petitioner urges that this statement of the rule is erroneous and is in conflict with the law applied in the Second, Third, Fourth, Seventh and Ninth Circuits. Petitioner argues that the holdings in those circuits is that the findings of a District Court in Admiralty cases rendered after a trial, in which the Court saw the witnesses and heard their

testimonies, are binding upon a Circuit Court and should not be set aside unless clearly erroneous.

In the concluding paragraph of the opinion in this case the Circuit Court stated (R. 167-168):

> "We are required to examine the record and determine for ourselves whether it fairly supports the findings. This we have done, minutely; and our conclusion is that there is no evidence to support either the findings in the matter above indicated or the decree. * * * as stated we have found no actionable negligence on the part of appellant (Respondent)."

It is submitted that, where there is no evidence to support findings, then those findings are "clearly erroneous."

Disregarding findings of the District Court not supported by the evidence and, therefore, clearly erroneous, the Circuit Court followed a rule well settled in the Sixth Circuit: *City of Cleveland vs. McIver* (C. C. A. 6) 109 F. 2d 69; *The Seeandbee* (C. C. A. 6) 102 F. 2d 577; *The Cleveco* (C. C. A. 6) 154 F. 2d 605; *Lamb vs. Interstate SS Co.* (C. C. A. 6) 149 F. 2d 914. Not only is the Sixth Circuit in accord with other circuits, but the Circuit Court applied the law as claimed by Petitioner.

Petitioner's Second Reason: It is urged that the Circuit Court could not deny Respondent's petition to limit liability and at the same time dismiss Petitioner's claim for damages. In reviewing the case the Circuit Court followed the order adopted in the District Court by first considering the petition and then the claim for damages. Treated in that order there was no relationship between the two proceedings. Obviously because Respondent's proof on his own petition showed that he was in charge of his own yacht at the time the decedent fell overboard, both courts concluded that the loss could not have occurred without his "privity or knowledge." 46 U. S. C. A. § 183(a).

No rule of substantive law prescribed by statute or recognized by the general maritime law is involved. The

question simply relates to the order in which issues are considered.

The decision of the Circuit Court leaves no uncertainty as to the disposition of Petitioner's claim. Petitioner requested the District Court to take jurisdiction of the claim for damages (R. 131). Having taken jurisdiction the Court was not only competent, but required, to dispose of the claim on the merits. *Providence & New York Steamship Company vs. Hill Manufacturing Co.*, 109 U. S. 578.

Petitioner's Third Reason: The Circuit Court said nothing which would indicate that the findings of the District Court should have been evidentiary in nature. The Circuit Court, after "minutely" examining the record, found relevant and undisputed facts for which there were no findings, either evidentiary or ultimate, and to which no reference was made in the District Court's opinion. If the language in the opinion of the Circuit Court is to be construed as criticism, then we submit that it was criticism only of the omissions of the District Court. The reversal of the District Court was not based on the form of the findings of fact and conclusions of law or the omissions in connection therewith but on more substantial grounds. The Circuit Court in its opinion stated (R. 167):

> "We are required to examine the record and determine for ourselves whether it fairly supports the findings. This we have done, minutely; and our conclusion is that there is no evidence to support either the findings in the matter above indicated or the decree."

Petitioner's Fourth Reason: By urging that the Circuit Court should have sent the case back to the District Court for further findings, Petitioner argues in effect that the Circuit Court was incompetent to review the record and make its own findings. An appeal in admiralty is a trial *de novo*. *Irvine vs. The Hesper*, 122 U. S. 256. The entire record is open to review and the Appellate Court may affirm, modify or reverse the decree as the interests of justice require. *Brown Paper Mills Co. vs. Irvine,*

(C. C. A. 8) 134 F. 2d 337, which is cited in the petition was an action at law and has no application in admiralty.

Petitioner's Fifth Reason: Petitioner misinterprets the holding of the Circuit Court that Respondent had the right to assume that decedent would use ordinary care for his own protection, and, as misinterpreted, attacks it. On this point the Circuit Court said (R. 165):

> "It was also shown that Dickie, 63 years of age and the Vice President of a shipbuilding concern, was an experienced seaman and a good swimmer, although he had defective vision in one eye and wore heavy glasses. Under these circumstances we think that appellant (Respondent) had a right to assume that Dickie would use ordinary care to protect himself and that it was not required of appellant (Respondent) to anticipate the necessity of having a life guard as a member of the crew. As a matter of law, appellant (Respondent) was not required to have a crew at all. He was not even required to have a license."

In further aid of her argument Petitioner, without any support in the record supplies the fact that decedent was in a position of danger while sitting in the chair in the cockpit. Neither the District Court nor the Circuit Court found that decedent was in any danger as he sat in the cockpit.

We do not deem it proper to argue the factual matters set forth in Petitioner's Brief on this point. It seems sufficient to say that the Circuit Court was on sound ground in holding that Respondent had a right to assume that decedent would use ordinary care to protect himself.

Petitioner's Sixth Reason: The inapplicability of the Motor Boat Act of 1940 has been discussed previously herein, page 5. Petitioner's argument under this point mentions the "common law of the sea" with a reference to 33 U. S. C. A. § 351. It would seem that Petitioner has gone far afield for authority as that section forms part of the "Navigation Rules for Red River of The North and Rivers Emptying into Gulf of Mexico and Tributaries."

Equally strained is Petitioner's attempt to give the impression that under authority of *The Linseed King*, 285 U. S. 502, Respondent was required to carry on the Cappy, a pleasure yacht, a life guard and crew. In that case an employer was using his own boat to transport his employes to their place of work. It is not true, as argued by Petitioner, that the Motor Boat Act of 1910 influenced the result in *The Linseed King*. There was no claim in that case that the Motor Boat Act of 1910 was violated. The District Court in that case stated that this latter Act merely prescribed life preservers for motor boats, 24 F. 2d 967, 970. The remaining cases cited in the petition on this point relate to commercial ships transporting cargo.

Petitioner's Seventh Reason: Because Petitioner obviously distorts the opinion of the Circuit Court with respect to the use of intoxicants, this reason is meaningless. What the Circuit Court said with reference to drinking was clear and concise and subject to no misinterpretation (R. 166):

> "We are bound by finding 3 that appellant (Respondent) and his guests had five or six drinks of liquor within a period of four or five hours before the accident, but we are not bound by finding 7 that appellant (Respondent) was incapable of coordination due to the use of liquor, coupled with his physical impairment, at the time of the accident. There is of course a presumption that intoxicating liquor if used to excess, will affect a person both mentally and physically, but there is no evidence that appellant's (Respondent's) judgment was so affected at the time Dickie went overboard. The undisputed evidence is that at that time appellant (Respondent) was steering the cruiser at about seven or eight miles an hour because of the roll of the lake. Moreover, there is no finding that appellant's (Respondent's) drinking, or physical condition, contributed in the least to the unsuccessful effort to rescue Dickie."

The cases cited by Petitioner on this point hold that, where a ship at the time of collision is in statutory fault, there is a presumption that the fault was a contributory

cause and the burden is on the ship to prove to the contrary. The principle considered and followed by the Circuit Court in this case is the law stated by this Court in *Union Pac. R. Co. vs. McDonald*, 152 U. S. 262, where p. 282, it was said:

> "Where human life or personal safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or to secure the other, unless the circumstances, under which that effort was made, show recklessness, or rashness."

Petitioner's Eighth Reason: There is no question respecting the Ohio Wrongful Death Statute. O. G. C. § 10509-166. It is wholly incorrect, as claimed by Petitioner, that the Circuit Court construed the Ohio statute contrary to the applicable decisions of this Court. The Circuit Court did not construe that statute at all. The Court merely commented that the defense of contributory negligence was available under the statute, but stated in the concluding paragraph of the opinion that consideration of this defense was not necessary because "we have found no actionable negligence on the part of appellant (Respondent)" (R. 168).

CONCLUSION.

It is submitted that this case is not a proper one for review by certiorari in this Court. No question of law is presented. The issue is purely factual without any element of national importance or public interest.

Respectfully submitted,

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